No. [redacted] 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

DORSEY K. OFFUTT, An Attorney, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTICRARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Dorsey K. Offutt, an attorney at law, respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered November 19, 1953, modifying a summary contempt judgment entered by Judge Alexander Holtzoff of the United States District Court for the District of Columbia, and reducing appellant's sentence of imprisonment from ten days to forty-eight hours.

THE OPINIONS BELOW

The United States District Court for the District of Columbia summarily adjudged petitioner in contempt of court and sentenced him to ten days' imprisonment. The Certificate of the District Court adjudging petitioner in contempt was entered June 16, 1952 (R. 25-29). The opinion of the United States Court of Appeals for the District of Columbia Circuit, modifying the District Court's adjudication of contempt and reducing appellant's jail sentence from ten days to forty-eight hours, has not yet been reported and appears at R. 264-267. The opinion of the Court of Appeals in the case of *Henry L. Peckham, Jr. v. United States of America*, No. 11,487, decided the same day, which is referred to and made a part of the Offutt opinion by reference, has not yet been reported and appears at R. 269-290.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on November 19, 1953. Petitioner timely filed a Petition for Rehearing (R. 291-302). The Court of Appeals entered an order denying this petition on December 14, 1953 but in that order deleted footnote 1 on page 3 of the original opinion and entered a new footnote 1, having reference to finding 11 of the District Court. The Court of Appeals stayed its mandate pending application to this Court for certiorari (R. 306). On January 15, 1954, this Court extended the time for filing the Petition for Writ of Certiorari to and including February 12, 1954. The jurisdiction of this Honorable Court is invoked under the Act of June 5, 1928, 28 U. S. C. A., Sections 1254 and 2101, and Rule 37 of the Federal Rules of Criminal Procedure.

SUMMARY STATEMENT

This case presents for correction errors of the United States District Court for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia Circuit. The case is one of importance. It involves important questions dealing with the right of an accused not to be deprived of his liberty without due process of law under the Fifth Amendment and to have the effective "Assistance of Counsel" as guaranteed by the Sixth Amendment to the Federal Constitution.

Petitioner, Dorsey K. Offutt, is a respected member of the Bar in good standing. On April 4, 1952 an indictment was returned in the United States District Court for the District of Columbia against Dr. Henry L. Peckham, a practising physician (R. 2). The indictment charged Dr. Peckham with committing two separate abortions at two different times involving the same complaining witness, a Mrs. Mary Lee Ott (R. 2). On May 23, 1952 petitioner entered his appearance for Dr. Peckham (R. 4). On the same day he appeared in the District Court and argued several preliminary motions. On May 26, 1952 petitioner argued a motion before Chief Judge Laws of the District Court which, among other things, sought a continuance to take the deposition of the mother of the complaining witness. This continuance was denied (R. 41-44). On May 27, 1952 the case was called for trial before Judge Alexander Holtzoff of the District Court and the trial commenced (R. 44). The trial lasted thirteen days. Twenty witnesses testified for the government and ten for the defense. Throughout the trial petitioner was sick, nervous and upset (R. 70, 72, 115). On numerous occasions during the trial, Judge Holtzoff addressed petitioner in a manner obviously upsetting and disconcerting, such as "stupid" (R. 55); "discourteous" (R. 139); "unethical" (R. 139); and with "losing his mind" (R. 226). The trial judge also

accused petitioner of being "insolent" on many occasions in and out of the presence of the jury (R. 79, 127, 226). The trial judge threatened to have the marshal pull petitioner to his seat and have him gagged (R. 180, 213, 215) and jailed (R. 81-82). Whenever petitioner asked in what respect he was guilty of misconduct, the judge rebuked him and refused his request for information.

For the first three days of trial the relations between the court and appellant were without serious incident. On June 3, 1952 difficulties commenced, because the judge rebuked counsel for his conduct but later expressed the view that he did not think counsel meant anything contumacious by his conduct (R. 69). The situation became further complicated because the prosecutor made uncomplimentary and prejudicial statements regarding petitioner (R. 70, 88, 105, 127, 128, 137, 138, 179, 180, 218). On one occasion, in the presence of the jury, the prosecutor stated that petitioner had threatened to punch him in the nose (R. 45-46). In no instance did the judge rebuke or admonish the prosecutor for his conduct (R. 287-290). Yet the record is replete with numerous instances of colloquy between the court and petitioner on which occasions the trial judge rebuked and chastized petitioner, even in the presence of the jury, and subjected petitioner to great provocation (R. 266, 267, 285, 290).

On June 16, 1952 the trial judge delivered his charge to the jury, who retired at 12:40 p. m. Immediately thereafter, but before the jury returned its verdict, the trial judge summarily adjudged petitioner guilty of criminal contempt of court, within the meaning of Rule 42(a) of the Federal Rules of Criminal Procedure, for petitioner's conduct during the trial and forthwith sentenced him to ten days in jail and committed him (R. 22).

No hearing was afforded petitioner. He was denied any right of defense, any right of explanation and the right to consult counsel (R. 257-258). Petitioner attempted to

deny guilt and requested a stay for a short time to consult counsel. This was denied and he was forthwith taken into custody by the marshal and removed from the courtroom, notwithstanding that the verdict of the jury had not yet been returned. After the petitioner had been arrested, a copy of the specifications of contempt and the order thereon were delivered by the trial judge to associate counsel for Dr. Peckham in the courtroom (R. 256-258). On the same day petitioner filed a written motion for bail, which was summarily denied by the judge without argument (R. 32-33). The specifications of contempt consisted of twelve main charges alleging different contempts (R. 25-29). By actual count, excluding the general contempt citation, the specific instances of alleged contemptuous conduct upon which the trial judge relied were 68 in number (R. 25-29). Petitioner perfected his appeal to the United States Court of Appeals for the District of Columbia Circuit on the day of his commitment (R. 22-24). An immediate appeal was necessary because the trial judge arbitrarily denied bail. This meant that petitioner's sentence would be carried out and he would have been deprived of any appeal contrary to *St. Pierre* v. *United States*, 319 U. S. 41, 63 S. Ct. 910, 87 L. Ed. 1198, and *Sacher* v. *United States*, 343 U. S. 1, 72 S. Ct. 451.

On June 16, 1952, the day petitioner was committed, the Court of Appeals granted bail on appeal. Appellant is at liberty on bail (R. 40-41).

Because of the importance of the questions involved, the Court of Appeals granted the parties permission to file briefs in excess of fifty pages and granted additional time for oral argument. On November 19, 1953 the Court of Appeals reversed charges 3, 4, 5, 7, 8, 9, 10 and 11 and affirmed charges 1, 2, 6 and 12 (R. 266-267).

Because of this modification of the findings the Court of Appeals concluded that the record did not support the penalty imposed and on the authority of *United States* v.

United States Mine Workers of America, 330 U. S. 258, 304 and *Rosenfeld* v. *United States*, 167 F. 2d 222, 225 (4 Cir.), unanimously concluded that petitioner's sentence should be reduced from ten days to forty-eight hours. Findings numbered 1, 2, 6 and 12 of the trial judge, which the Court of Appeals affirmed, may be summarized as findings that petitioner was (1) discourteous to the court, (2) repeated questions, some of which were intended to besmirch a witness, (6) asked prejudicial questions of the prosecuting witness without foundation and (12) tried to create an episode which might lead to a mistrial. The Court of Appeals affirmed the summary judgment of contempt based on these findings, notwithstanding that that court found that petitioner's "conduct cannot fairly be considered apart from that of the trial judge" (R. 266). The reasoning of the court below was that appellant suffered "great provocation" from the trial judge (R. 266). Accordingly, that court concluded (R. 266-267):

> The judge's treatment of appellant, examples of which are included in an appendix to our opinion in *Peckham* v. *United States*, decided today, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand, leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours.

Notwithstanding that the Court of Appeals was of the opinion that the judge's treatment of appellant was the "chief factor" in causing the court to reverse the *Peckham* case and to reduce the sentence, the court below permitted four findings of contempt to stand, even though the findings were made by a judge who subjected petitioner to "great provocation" (R. 266) and who was affirmatively found by the Court of Appeals to have showed a lack of impartiality, hostility and bias against petitioner and his client. The Court of Appeals has found that the prosecutor in the trial below also was guilty of prejudicial

misconduct (R. 281-282). Thus, we have a situation involving a hotly contested and highly controversial trial which resulted in an unfair trial, principally because of the conduct of the trial judge, and contributed to by misconduct of the prosecutor. The trial judge was personally involved and invaded the area reserved to counsel, thus creating a conflict which arose in the trial and out of which the contempt citation grew (R. 266-267, 281-282). Notwithstanding that the Court of Appeals reversed 8 of the 12 grounds upon which the contempt citation rested, that court has ordered that petitioner be sentenced to jail for forty-eight hours, and this even though as the court below held (R. 266) petitioner's "conduct cannot fairly be considered apart from that of the trial judge." We are of the view that this Court has held that contested criminal cases must be supervised and controlled only by a "neutral judge" (*Sacher* v. *United States*, 343 U. S. 1, 8) and that where the right of counsel to vigorously defend his client is infringed by a judge, counsel will be protected. (*Sacher* v. *United States*, supra, 9, 13).

A Petition for Rehearing was timely filed below (R. 291-302). In that petition we pointed out that while the proper respect is due the Bench, this Court's warning in the *Sacher* case should be borne in mind that both judges and lawyers are human and both are heirs to all the weaknesses of the human flesh. We pointed out further that while the dignity of the Bench should be upheld, because the conduct of counsel could not be separated from the misconduct of the judge, the ends of justice would have been served if appellant's sentence had been reduced to a fine or suspended in the event that court did not feel as we did, that the sentence in toto should be voided. While the court modified its opinion, in accordance with the first prayer of our petition, it refused to further modify its judgment of November 19, 1953 and permitted a jail sentence against petitioner to stand, even though imposed summarily and without a hearing by a biased and

prejudiced judge who invaded the area reserved to counsel, provoked counsel and by his conduct deprived petitioner's client of a fair and impartial trial.

As we view Rule 42 of the Federal Rules of Criminal Procedure, existing legislation and the applicable decisions of this Court, summary punishment cannot be imposed upon an attorney acting in the defense of a criminal case by a biased and prejudiced judge, who has invaded the area reserved to counsel and who became so personally involved in the trial that petitioner's conduct cannot be considered apart from the judge, and in such a situation an attorney is entitled to a hearing by another judge under Rule 42(b). *Cooke* v. *United States*, 267 U. S. 517, 69 L. Ed. 767.

As this situation is important, not only to petitioner but to all trial attorneys, certiorari was sought to correct the manifest injustice involved in the ruling below, which jails an attorney for contempt, notwithstanding that it has been found by the Court of Appeals that the alleged contemptuous situation arose through improper actions of the trial judge and the prosecutor.

QUESTIONS PRESENTED

The Court of Appeals modified a summary order of contempt of the District Court, sentencing petitioner to jail for ten days and reduced that sentence to forty-eight hours. In reducing the sentence that court held that this was necessary because the trial judge provoked petitioner, showed bias and prejudice and by his treatment of petitioner, which could not be separated from the conduct of petitioner, barred the appellate court from sustaining the proceedings below as fair and impartial (R. 266, 281-282).

In reversing the *Peckham* case and in modifying the judgment in the *Offutt* case, the court below held (R. 281-282):

A number of other questions are presented generally. These include claims of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the judge's assumption of the function of an advocate, lack of impartiality, and prejudicial remarks by the prosecutor. As to the effect of these matters on the fundamental fairness of the trial this court finds itself divided. Judge Edgerton and Judge Bazelon, constituting a majority of the court, are convinced that the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury; that, considering these matters and others, examples of which are set forth in an Appendix attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial. This necessitates reversal.

The writer of this opinion feels decidedly that it would have been preferable for the court to have restrained his interruption of the examining process. The Government was well represented and the extent of the judge's participation was not required by his obligation to maintain a firm and salutary control of the proceedings. We have today in No. 11466, *Offutt v. United States*, sustained the contempt conviction of defense counsel due to his conduct in this case but we have reduced the sentence. By sustaining the conviction we have expressed our conclusion that counsel was contemptuous, while in reducing the sentence we have reflected our view that his conduct was not altogether separable from that of the judge in treading the area reserved for counsel, thus creating conflict and engendering remarks and attitudes on the part of both court and counsel which afflicted the trial.

As we read the language of the court below in the light of the examples set forth in the appendix to the *Peckham* opinion (R. 285-290), that court held that petitioner was subjected to great provocation from the trial judge

(R. 266), that "degrading and belittling remarks" were "directed to defense counsel" by the judge, that the judge assumed "the function of an advocate" and displayed "lack of impartiality" (R. 281-282). In reversing the *Peckham* case, the court below concluded that these actions of the trial judge and his excessive "injection • • • into the examination of witnesses (and) his numerous comments to defense counsel, indicating at times hostility • • • demonstrated a bias and lack of impartiality • • •" rendered the trial unfair. The court below concluded that the "treatment of appellant" by the trial judge was the "chief factor" which led the court below to conclude that neither the conviction of *Peckham* nor the sentence of petitioner could stand unmodified (R. 266-267). Against this background we say that the following questions are presented:

1. Whether the biased and prejudiced conduct of the trial judge and his treatment of petitioner precluded the trial judge from exercising against petitioner the summary power to hold petitioner in contempt of court, provided for in Rule 42(a) of the Federal Rules of Criminal Procedure.

2. Whether the findings of the Court of Appeals in affirming the judgment as modified, which show that the trial judge participated in the trial in such prejudicial fashion as to provoke petitioner to do the things which he did and upon which the modified judgment of contempt now rests, render the modified and summary judgment of contempt void because entered by a judge who was provocative and not impartial, as required by the rulings of this Court in *Cooke* v. *United States*, 267 U. S. 517, 69 L. Ed. 767, and *Tumey* v. *Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749.

3. Whether a trial judge who has been found by the Court of Appeals to have invaded the area reserved to

counsel, who provoked counsel and who has shown hostility, prejudice and a lack of impartiality against petitioner was disqualified to exercise the summary power of contempt provided for in Rule 42(a) because of the decisions of this Court in *Cooke* v. *United States*, supra and *Toney* v. *Ohio*, supra.

4. Whether the exercise of summary power of contempt provided for in Rule 42(a), under the circumstances as now found by the Court of Appeals, was appropriate and proper. In this connection it can be assumed that the trial judge had summary power under Rule 42(a) but it should be remembered that the summary judgment of contempt against petitioner came at the conclusion of the charge to the jury and notwithstanding that the trial judge had ample opportunity to afford petitioner a hearing within the usual conception of the due process of law as required by the Fifth Amendment to the Constitution without impeding or otherwise restricting the trial in the *Peckham* case.

5. Whether under all the circumstances of the case as now decided by the Court of Appeals in the *Offutt* and *Peckham* cases, which must be read together, petitioner was denied due process of law in violation of the Fifth Amendment by the trial judge because that judge proceeded summarily and denied petitioner the right to notice, charges, a hearing, including the right to offer evidence in contradiction or mitigation of such charges and to be represented by counsel.

6. Whether the exercise of summary power to adjudge an attorney, acting as defense counsel in a criminal case, in contempt exceeds the bounds of fair discretion as applied to those charges of contempt which the Court of Appeals has sustained, notwithstanding that that court has found that the judge imposing that summary sentence was hostile, prejudiced and not impartial and guilty of provocation.

7. Whether this Court should exercise its power (described in *Sacher* v. *United States*, 343 U. S. 1, 9, 13) and protect defense counsel in a criminal case in the fearless, vigorous and effective performance of the duties pertaining to the office of advocate against an arbitrary exercise of summary contempt power under Rule 42(a), when the Court of Appeals sustained specifications dealing only with discourteous remarks, repeating questions, asking prejudicial questions of the prosecuting witness in an abortion case and sought a mistrial, where there is no finding either by the trial judge or the Court of Appeals that this specified conduct impeded the trial or obstructed the progress of the trial. In this connection it must be borne in mind that the trial judge did not find, nor did the Court of Appeals find, that there was a willful intent on the part of petitioner to violate court rulings in doing what he did to protect his client in the trial below, which trial has now been held by the Court of Appeals to be a mistrial mainly because of the conduct of the trial judge. In the absence of bad motives and specific intents, contempt charges in such circumstances summarily imposed upon trial counsel cannot be sustained. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

8. Whether this Court should protect petitioner in accordance with *Sacher* v. *United States*, supra, 1, 9, 13, when the record shows that the District Court is conducting proceedings seeking to disbar petitioner from the practise of his profession, predicated in part on the summary findings entered by the trial judge, four of which have been affirmed on appeal, notwithstanding that the trial judge's conduct and the misconduct of the prosecutor were such as to require a modification of the sentence imposed upon petitioner and the reversal of the main action because such conduct was prejudicial and rendered the trial unfair.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

Constitution of the United States:

Article III, Section 2(3)

> The trial of all crimes, except in cases of impeachment, shall be by jury; * * *

> Fifth Amendment. No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

> Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, Section 401, U. S. C. A., Chapter 21:

Power of Court:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

> (2) Misbehavior of any of its officers in their official transactions;

> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Criminal Procedure, Title 18, U. S. C. A.

Rule 42. Criminal Contempt.

> (a) Summary Disposition. — A criminal contempt may be punished summarily if the judge certifies that

he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. — A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilty, the court shall enter an order fixing the punishment.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In not granting a jury trial to appellant on the four charges of contempt which were affirmed below.

2. In finding as a matter of law and of fact that the four instances cited, or any of them, constituted criminal contempt in violation of Rule 42(a) of the Federal Rules of Civil Procedure contrary to the provisions of the Fifth and Sixth Amendments to the Constitution.

3. In affirming four findings of contempt summarily entered by a trial judge under Rule 42(a) of the Federal Rules of Criminal Procedure, notwithstanding that the court below has found that the trial judge was personally

involved, showed hostility and bias, a lack of impartiality, provoked petitioner and invaded the area reserved to counsel.

4. In affirming summary findings of contempt imposed by a prejudiced and hostile judge, where there was no finding that petitioner's conduct impeded the trial or was willful and taken with bad motives.

5. In affirming findings of contempt imposed under the facts and circumstances as now determined by the Court of Appeals where the findings violate the provisions of the Fifth and Sixth Amendments to the Constitution of the United States and have the effect of hindering and preventing petitioner in carrying out the office of an advocate and rendering effective "Assistance of Counsel," guaranteed to every defendant in a criminal case.

REASONS FOR GRANTING THE WRIT

Several of the reasons usually advanced for the allowance of a Writ of Certiorari are present in this case. The court below has rendered a decision in conflict with other Circuit Courts of Appeals, has decided important questions of law contrary to earlier decisions of that court and has decided important questions of Federal law in conflict with the applicable decisions of this Court. In addition, the court below has permitted and sanctioned such a departure from the accepted and usual course of judicial proceedings in the exercise of the summary power of contempt by a lower court as to call for the exercise of this Court's power of supervision. The decision below also decides questions of general importance and of substance relating to the construction and application of the Federal Constitution, a Federal Statute and Rule 42 of the Federal Rules of Criminal Procedure and in deciding these questions has not given proper effect to the applicable decisions of this Court.

I.

In its decision the court below, after reversing the findings of the trial judge numbered 3, 4, 5, 7, 8, 9, 10 and 11, held (R. 266) that the record "does not support the penalty imposed" because the appellant's conduct "cannot be considered apart from that of the trial judge." The reasoning of the court below, among other things, was that petitioner suffered "great provocation" from the trial judge. Yet, instead of reversing the summary judgment of contempt imposed by the trial judge, the court below reduced the sentence of ten days to 48 hours. We submit that the summary judgment under the facts as now determined by the Court of Appeals should have been reversed in its entirety. The court below reviewed the actions of the trial judge and as we read that review (R. 266, 281-282) concluded that petitioner was subjected to "great provocation," "degrading and belittling remarks" and that the trial judge in doing what he did assumed "the function of an advocate" and displayed lack of impartiality, hostility and bias. The situation was further complicated to petitioner's prejudice because of the misconduct of the prosecutor (R. 281-282, 287-290). The court below pinpointed its condemnation of the trial judge by holding that his "treatment of appellant" (petitioner) was the "chief factor" in causing the court below to reverse the *Peckham* trial and reduce petitioner's sentence. We submit that in such a situation where it has been determined on appeal that the trial judge was guilty of "provocation", "hostility", "bias" and "lack of impartiality" and sanctioned misconduct of the prosecutor and thereby deprived petitioner's client of a fair and impartial trial and *invaded the area reserved to counsel*, thus creating conflict, that the principles announced by this Court in *Cooke* v. *United States*, 267 U. S. 517, 539, and *Tumey* v. *Ohio*, 273 U. S. 510, should be applied and the summary judgment of contempt entered below should

is reversed in its entirety. Our contention is supported by the Advisory Committee Notes pertaining to Rule 42(b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., page 495, Note 4, which state:

> that the provision in the sixth sentence disqualifying the judge affected by the contempt if the charge involves disrespect to or criticism of him is based, in part, on * * * and the observations of Chief Justice Taft in *Cooke* v. *United States*, 45 S. Ct. 390, 267 U. S. 517, 539; 69 L. Ed. 767.

As the Court of Appeals has found that the trial judge became personally involved in the four findings remaining unreversed of his contempt citations, summary proceedings should not have been indulged in and should not have been upheld on appeal.

Moreover, the decision below which now upholds a judgement entered by a trial judge found by the Court of Appeals to be biased and prejudiced, conflicts with an earlier decision of the same court. *Whitaker* v. *McLean*, 73 App. D. C. 259, 118 F. 2d 596.

The existence of the power to punish summarily for contempt does not mean that it is always appropriate to use it. *Cooke* v. *United States*, supra.

This summary power should never be used where the trial judge is personally involved, shows hostility and bias and invades the area reserved to counsel in such fashion as to render the trial unfair. The employment of summary power to adjudge a lawyer in contempt seems inherently to involve the basic thought that the judge exercising such arbitrary power should be free from fault and should be precisely correct in his conduct. After all, the judge and the lawyer are both human and are both officers of the court. As this Court pointed out in *Sacher* v. *United States*, 343 U. S. 1, 8, there is strife in the trial of a contested criminal case, hence the supervision and control over counsel must be exercised "by a neutral judge." In

the *Sacher* case, this Court made it clear that where the vigorous defense of counsel brings him in conflict with the trial judge and where the area reserved to counsel is infringed by the trial judge, counsel will be protected against the exercise of summary contempt power. Thus, this Court in the *Sacher* case held (p. 9):

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears far fetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts.

and at page 13:

> But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

It seems to us that the conflict below arose because of certain philosophies held by the trial judge on how court room procedures should be expedited. In a recent address delivered on April 6, 1953 before the Philadelphia Regional Chapter of the American Society for Public Administration, University of Pennsylvania (14 F. R. D., pp. 323-330), the trial judge opened his speech with a statement that "the legal profession is now conscious of its own frailties," and quoted the lines of Gilbert spoken by the Lord Chancellor in "Iolanthe" (p. 323):

> The Law is the true embodiment
> Of everything that's excellent.
> It has no kind of fault or flaw
> And I, my Lords, embody the Law.

The trial judge then urged streamlining of cases for trial, that jurors should be examined on the voir dire by

the judge alone and stated that the judge himself could select a jury in a criminal case in an hour or less and in routine civil or criminal cases in less than ten minutes and rarely more than twenty minutes. The judge stated his philosophy of expediting trials as follows (p. 326-327):

> Other means of expediting a trial involve the constant and continuous exercise of firm control by the judge. Too often, in State courts particularly, he is regarded as a mere moderator or chairman. This is not the wholesome common law concept. The judge should participate in the trial and regulate its course. He should not permit it to leave its proper channel. He has the right to exclude of his own motion all immaterial and irrelevant evidence and confine the trial to the issues to be determined.

Further, the trial judge stated (p. 327) "the court is clothed with power * * * to curb" counsel's interrogation of witnesses and contended that prolonged examinations caused departures, tangents and side issues which distract juries. We submit that the application of these principles to some extent caused the judge below to invade the area reserved for counsel as found by the court below (R. 282), and caused the conflict between the judge and the petitioner. Now that the court below has further found that the trial judge's treatment of petitioner showed bias, hostility and a lack of impartiality, the summary judgment imposed by him against petitioner should not be permitted to stand. We, of course, realize that the dignity of the Bench must be upheld, but as this Court warned in the *Sacher* case, judges too are heirs to all of the weaknesses of the human flesh and where a judge by his conduct provokes incidents, invades the lawyer's field and creates strife, it does not seem fair to us that, under such circumstances, an attorney endeavoring to carry out the duties of an advocate as best he can in order to afford the effective "Assistance of Counsel" guaranteed an accused by the Sixth Amendment to our Constitution, should be held in contempt if he fights

back and attempts to meet such conduct on the battlefield of the judge's choosing, the open court. The ends of justice in such an instance would be best served by the language of an appellate court's opinion rather than by the imposition of imprisonment upon counsel alone.

The decision below raises questions of vital importance to courts and trial counsel alike and is contrary to *Cooke* v. *U. S.*, supra, *Tumey* v. *Ohio*, supra and *Whitaker* v. *McLean*, supra. It sanctions such a departure from accepted and usual course of judicial proceedings in enforcing contempt powers as to call for the exercise of this Court's powers of supervision and correction. The important principles involving the exercise of contempt power by a biased and prejudiced judge under Rule 42 of the Federal Rules of Criminal Procedure should be decided by this Court in the public interest and in the aid of the proper administration of criminal justice.

II.

It has long been a fundamental concept of American jurisprudence that the judge who presides over civil and criminal cases should be fair, unbiased and completely impartial. Any bias, hostility or prejudice, or even interest in the outcome of a given civil or criminal case will disqualify a judge from presiding over that case. *Tumey* v. *Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749.

In the *Tumey* case in ruling that the presiding judge in a judicial proceeding in our country under either the Fifth or Fourteenth Amendments must be impartial and in defining the term "due process of law" this Court said (p. 535) due process requires that the presiding judge be impartial and if that judge is not impartial he is disqualified to enter any judgment thereafter in the proceedings. Thus, this Court said in reversing a judgment imposed by a Ohio judge (p. 535):

> It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100, which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge * * *.

To affirm a judgment of conviction imposed by a judge whom the Court of Appeals found to be biased, prejudiced and not impartial is contrary to the national solicitude that tribunals of this country shall not only be impartial to controversies submitted to them, but shall give assurance that they are impartial and free from any bias or prejudice that might distrub the normal course of impartial judgment. *Berger* v. *United States*, 255 U. S. 22, 35, 36, 41 S. Ct. 230, 65 L. Ed. 481.

Where bias or prejudice is shown on the part of the presiding judge, it is the duty of that judge to proceed no further in the case and not to enter a final judgment. As our Court of Appeals has found the trial judge here was biased and prejudiced and lacked impartiality, it follows even under Rule 42(a) that he could not proceed further and certainly could not enter a summary judgment of contempt because being biased that judgment would not be impartial. That court has applied the principles of the *Berger* case to bias arising during the course of a trial. *Whitaker* v. *McLean*, 73 App. D. C. 259, 118 F. 2d 596.

In the *Whitaker* case the court below reversed the action of the trial judge because it appeared in a colloquy with counsel during the trial, occurring in the absence of the jury, that the trial judge made certain remarks which caused plaintiff's counsel to express the opinion that he could not very well go on because of the judge's remark

evidenced bias and prejudice. At the conclusion of this bench colloquy the trial, nevertheless, proceeded and at the close of the testimony the trial judge directed a verdict for the defendant. In reversing this case, our Court of Appeals said (p. 596-597):

> The judge may, as indeed he insisted, have felt no hostility to the plaintiff, and in that view he was subjectively free from bias. But bias must be considered objectively. Few, if any, judges would make the reported remarks, in the course of a trial unless they had developed definite and positive hostility to the plaintiff and his case. Hostility is a form of bias. When a judge has shown bias before trial, Section 21 of the Judicial Code, 28 U. S. Code Annotated, Sec. 25 provides means of disqualifying him. The policy underlying Sec. 21 is the Courts of the United States 'shall not only be impartial in controversies submitted to them but shall give assurance that they are impartial;' i.e. shall appear to be impartial. *Berger* v. *United States*, 255 U. S. 22, 36; 41 S. Ct. 230, 235; • • •
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> A bias which develops during the trial and 'is grounded on the evidence' has been held not to be within the terms of Section 21. • • • Often some degree of bias develops inevitably during the trial. Judges cannot be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself. But a right to be tried by a judge who is reasonably free from bias is part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him.

The action of the court below in permitting a summary judgment of contempt to stand when that court has found that the trial judge who imposed the sentence was guilty of bias, hostility and a lack of impartiality, is contrary to the rulings of this Court in the *Tumey* and *Berger* cases and to the decision of the court below in the *Whitaker* case

and is a denial of due process of law guaranteed to petitioner under the Fifth Amendment. Even if we assume the existence of the summary power to adjudge an attorney in contempt, under the circumstances which the Court of Appeals below has found to exist in affirming in part the summary contempt judgment here involved, we question whether it is appropriate to permit such a judgment to stand. In the first place, the Court of Appeals has found that the trial judge imposing the contempt sentence was hostile, prejudiced and not impartial and invaded the area reserved to counsel. These circumstances are sufficient to disqualify the trial judge from exercising the summary provisions of Rule 42(a).

Nor was it appropriate even if the trial judge was qualified to act, which is denied, to exercise the summary power of contempt provided for in Rule 42(a). The summary judgment attempted to be imposed by the trial judge came at the conclusion of the charge to the jury (R. 256). The trial judge had full opportunity to afford petitioner a hearing within the usual conceptions of due process of law as required by the Fifth Amendment. This procedure would not have impeded or obstructed the trial of the *Peckham* case. While summary contempt proceedings are authorized by Rule 42(a), we submit that the theory behind them is to "enforce obedience and order in the court and not to impose unconditional criminal punishment." *Sacher* v. *United States*, 343 U. S. 1, 22 (Dis. Op. J. Black), 29 (Dis. Op. J. Frankfurter).

In *In re Oliver*, 333 U. S. 257, 92 L. Ed. 682, this Court squarely held (pp. 274, 275) that the only time that the exercise of the "extraordinary but narrowly limited power to punish for contempt" by way of a summary proceeding is authorized and the "due process" requirements can be ignored is only where "charges of misconduct" occur "in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court and where immediate

punishment is essential to prevent 'demoralization of the court's authority' before the public."

When the need of preserving obedience has passed, there is no need to punish an alleged contempt in a summary manner and it should be dealt with as the law deals with other illegal and criminal acts (*Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425-426) because summary power is "capable of grave abuses" and is limited in exercise to "the least possible power adequate to the end proposed." *In re Oliver*, supra, 274.

Article III, Section 2 of our Constitution requires that the trial of all crimes shall be by jury. Contempt proceedings are criminal prosecutions brought to punish public wrongs. While there are unusual instances in which this Court has upheld summary proceedings in contempt cases, nevertheless this Court has made it clear that such a proceeding should be used only if necessary to preserve order in the court or to prevent interference with the court's processes or business. Recent decisions of this Court have expressed caution in the exercise of summary contempt power. *Michaelson* v. *United States*, 266 U. S. 42; *Nye* v. *United States*, 313 U. S. 33; *Cooke* v. *United States*, 267 U. S. 517.

If summary proceedings are to be indulged in at the whim of a judge, particularly if that judge by his conduct has shown bias and prejudice against an attorney, the judiciary will have power to sentence and confine citizens of the United States without even the semblance of a hearing or any of the steps which have been considered necessary in a criminal case. Moreover, to permit a biased judge to so act would be tyrannical, oppressive and wrong. *Hovey* v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215.

The warnings which this Court announced in 1897 in the *Hovey* case are peculiarly applicable and timely today. In condemning the exercise of the contempt power by a court of the District of Columbia, this Court held (p. 413):

> The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

As this Court so pointedly said in the *Hovey* case, a sentence pronounced without an opportunity and without the right of defense generally is not entitled to the respect of any tribunal and to commit a person without a hearing, except under the extraordinary exceptions approved by this Court to protect the court itself, would be a most flagrant violation of the rights of a citizen and could convert the judiciary into an engine of oppression capable of destroying great constitutional safeguards.

In the instant case no need was shown for the exercise of the summary power of contempt and its exercise in this case was oppressive and the wrongful culmination of the invasion by the trial judge of that area reserved to counsel, who was duty bound to give fearless and effective "Assistance of Counsel" to his client as required by the Sixth Amendment. *Johnson* v. *Zerbst*, 304 U. S. 458, *Powell* v. *Alabama*, 287 U. S. 45.

III.

The trial judge in taking the action he did and in sentencing petitioner to jail denied the petitioner the right to notice, charges, a hearing, including the right to offer evidence in contradiction or mitigation of such charges and the right to counsel. The summary contempt power of its very nature is subject to being exercised arbitrarily and in a fashion which will deprive an accused of all of the safeguards of due process of law as guaranteed by the Fifth Amendment. This contempt power should be narrowly

restricted and when used it should only be in cases of contempts occurring in the actual presence of the court which are willful and which if not immediately suppressed will disturb the court's business or interfere with the processes of the court. *Cooke* v. *United States*, supra.

When all of these elements are not present, the summary contempt power should not be used. The provisions of Rule 42(a) are permissive and do not require that all contempts occurring in the presence of the court be proceeded with summarily.

As the trial judge did not find in the four charges which were sustained on appeal, and as the appellate court likewise did not find in affirming these four charges that appellant's conduct obstructed the course of justice in some way and was done wilfully and with bad motives, the findings are void (*In re Watts and Sachs*, 190 U. S. 1, 32) and in any event should not have been entered summarily. To enter such abortive findings was both an inappropriate exercise of the summary power of contempt and exceeded bounds of fair discretion. In no event could a biased judge preside in such summary proceedings and enter judgment. *Tumey* v. *Ohio*, supra; *Whitaker* v. *McLean*, supra.

IV.

This Court held in *Sacher* v. *United States*, 343 U. S. 1, 9, 13, that it will protect defense counsel in a criminal case in a fearless, vigorous and effective performance of the duties pertaining to the office of an advocate against an arbitrary exercise of summary contempt power under Rule 42(a). We say this is an appropriate case for the exercise of this power of protection. The specifications of contempt sustained by the Court of Appeals were imposed summarily by the trial judge and now relate to discourteous remarks, repeating questions, asking prejudicial questions of a prosecuting witness in an abortion case and the seeking of a mistrial. Neither the trial judge nor the Court of

Appeals found that there was a wrongful intent on the petitioner's part as counsel for Dr. Peckham to violate court rulings in doing what he considered to be his duty to protect his client in the controversial trial below. Moreover, that trial has now been held by the Court of Appeals to have been a mistrial, mainly because of the misconduct of the trial judge and his display of bias and prejudice directed against petitioner. Concerning the affirmed charges bad motives and specific intents must be proven and found against petitioner before contempt charges can be upheld, even if legally entered, which is not the situation here. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

Moreover, the record does not support the findings that counsel was discourteous to the trial judge when we view his conduct and measure it against the prejudicial conduct of the trial judge and the prosecuting attorney. The insolence of which the trial court complains were attempts made on the part of petitioner to have the record reflect personal mannerisms and tones of voice of the trial judge which petitioner considered were prejudicial to his client and improper (R. 74-79, 81-82, 113-114, 146, 154-155, 157-158, 177-179, 195-196, 209-210, 221-222).

The court below has held in other cases involving the same trial judge that counsel have the right to have the record reflect the personal mannerisms and personal conduct of that judge, if counsel deem such conduct prejudicial, as the conduct would otherwise not appear of record. *Butler* v. *United States*, 88 U. S. App. D. C. 140, 188 F. 2d 24; *Billeci* v. *United States*, 87 U. S. App. D. C. 274, [illegible] F. 2d 394; *Vinci* v. *United States*, 81 U. S. App. D. C. [illegible] F. 2d 777.

In this respect the record will show that petitioner's objections were made in a respectful manner and that the trial judge, because of his sensitivity in his personal behavior, never denied the improper conduct charged to him by petitioner, but considered petitioner's efforts to have the record reflect that conduct as insolent and contemptu-

ous. Appellant's actions in noting his objections to the trial judge's conduct cannot be considered contempt, if the decisions of the court below in the *Butler*, *Billeci* and *Vinci* cases mean what they state.

The ruling of the trial judge which has been affirmed by the court below that the repeating of questions constitutes contempt is contrary to *Caldwell* v. *United States* (C.C.A. 9), 28 F. 2d 684; *Harris* v. *H. W. Gossard Co.*, 185 N. Y. Supp. 861, 194 App. Div. 688; and *Bennett* v. *Superior Court in and for San Diego County (Calif.)*, 222 P. 2d 876.

The ruling of the trial judge, which also has been affirmed by the court below, that questions of counsel directed to Mary Ott, the prosecuting witness, were contemptuous because those questions tended to besmirch her, is not supported by the record. Mary Ott was the complaining witness under both counts of the indictment which charged two separate abortions. The evidence showed that she had lived in adultery with her paramour, had led an immoral life and had been involved in prior and earlier abortions. It was the ruling of the trial judge that these earlier events and her living with other men while she was married was not admissible and it was petitioner's effort to get these facts into the record that are now treated as contemptuous and besmirching the prosecuting witness. A part of the defense was that there was a strong hypothesis that one of the abortions charged in the indictment could have been committed by the prosecuting witness upon herself. Her denial that she committed the abortion should not have foreclosed counsel's cross-examination to bring before the jury these facts and the moral character of this woman. It must be remembered that the defendant, Dr. Peckham, denied committing the abortion charged. It was consistent with this defense that the witness herself was not only capable of committing the abortion but she had previous experiences with abortions. Moreover, the evidence was admissible on credibility. The court below has so ruled.

Thompson v. *United States*, 30 App. D. C. 352, 12 Ann. Cas. 1004.

Meretricious relationships of witnesses may be shown in a criminal case as they affect morals, hence credibility, and show such witnesses in their true light. Questions to this end are proper and do not "besmirch" a witness, and this Court has so held. *Alford* v. *United States*, 282 U. S. 687, 692, 51 S. Ct. 218, 75 L. Ed. 736; *Tla Koo-yel-lee* v. *United States*, 167 U. S. 274, 17 S. Ct. 855, 42 L. Ed. 166.

Even the trial judge here involved has so ruled in the prosecutor's favor. *United States* v. *Edmonds*, 63 F. Supp. 968, 973.

Petitioner as defense counsel for the defendant was duty bound to raise these questions concerning the prosecutor's chief witness and to obtain a ruling of the trial court thereon so that he might preserve his contentions for appeal. Counsel was doing no more than this in asking the questions which he did and as the trial judge and the court below have failed to find that the questions asked by petitioner were willful and intentional violations of existing court orders, this finding is abortive and void. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

With respect to the finding of the trial judge that petitioner sought to provoke a mistrial, the Court of Appeals has now found that the trial below was a mistrial because of the improper conduct of the trial judge. In such a situation we do not see how, because counsel insisted throughout the trial that the judge's conduct had caused a mistrial, these actions can be treated as contempt. It seems anomalous to us when it is now admitted that appellant's motions to have a juror withdrawn and a mistrial declared were well taken, that he should now be held in contempt because he pressed this valid contention during the trial.

Finally, insofar as the four charges are concerned which the Court of Appeals has permitted to stand, as motives, intents and purposes are necessarily involved in each of these findings, petitioner should have been afforded the opportunity to testify and defend his motives, intents and

purpose both by way of defense and by way of mitigation. *Cooke* v. *United States*, supra; *Boules* v. *United States*, 50 F. 2d 848, 850.

As no hearing was afforded and no evidence was taken concerning appellant's motives, intents and purposes, the judgment below is abortive and invalid as modified because based upon an incomplete and improper record. *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292.

And even if the remaining findings had found deliberate intent and willful misconduct, which they do not, the record would not support any such findings. The trial judge below on numerous occasions has specifically found throughout the trial that the conduct which resulted in his certificate was not done in bad faith and was not done intentionally by petitioner. Thus, at R. 69 petitioner stated to the judge when he was accused of being belligerent and insolent that he did not mean to be so, whereupon the judge replied, "I am sure you didn't, but still let it not be done." This is an important ruling because the judge was dealing with many "breaches of my rule" by petitioner (R. 68). At R. 70, when the judge objected to the mannerisms of petitioner and insisted that he must be calm and courteous, petitioner replied, "I mean to be courteous at all times, your Honor," whereupon the judge replied, "No you haven't, you may not be conscious of it." Again at R. 73 when the judge below discussed the tone of petitioner's voice "on several occasions" as being "somewhat belligerent" the judge stated, "And I would say you probably didn't intend it as such." And, at R. 89, after petitioner objected to the witness Ott's signaling answers to her mother (R. 88), the judge below suggested that petitioner was acting in an "excitable and in a boisterous manner," whereupon petitioner stated, "I did not mean to be boisterous." The judge said, "I assume that you didn't mean that * * *." Later in the trial (R. 153) when petitioner was endeavoring to establish through cross-examination of Christianson,

a felon, the paramour of Mrs. Ott and the cause of her pregnancy, that he participated in the crime of abortion and was an accomplice, the judge suggested to petitioner that he should treat such a witness with a "little more courtesy." Petitioner thereupon assured the judge that he was being firm with the witness but he was entitled to get answers to his questions, that he was not discourteous and that he was speaking in a courteous tone, whereupon the judge said (R. 153) "You have a right to be firm." Thus, we submit that the trial judge has specifically found and ruled throughout the trial that appellant in doing what he did, did not mean to be contemptuous, did not mean to be boisterous, intended no discourtesy and had a right to be firm. How in such circumstances appellant can now be adjudged in contempt for these very situations is difficult for us to understand and is contrary to the *Watts* and *Sachs* case.

Inherent in the arbitrary and summary judgment of contempt here imposed is the threat of further punishment by way of disbarment or suspension. If the judgment is permitted to stand, this threat also strikes at the very heart of the right of an accused to the effective "Assistance of Counsel". Not only does the dangerous threat exist of this character, but the trial judge as shown by the record (R. 257) referred all twelve of his charges to the District Court to be used as a basis for the disbarment or suspension of appellant and proceedings looking to this end are now pending in that court. This well illustrates our point that the arbitrary exercise of the contempt power can effectively destroy the office of advocate and deprive the citizen of that fair and impartial trial guaranteed by the Fifth Amendment.

CONCLUSION

A ruling by this Court is essential in the interest of trial judges and trial lawyers. A proper administration of criminal justice requires a ruling on the conduct here involved.

We say if the present modified ruling is permitted to stand and is not reversed that a serious blow will have been struck at the right of an accused in a criminal case to have courageous and effective Assistance of Counsel, as guaranteed by the Sixth Amendment. Moreover, if a summary judgment imposed by a biased judge is permitted to stand against an attorney, a fundamental right, that is, the right to a fair and impartial trial, as guaranteed by the Fifth and Fourteenth Amendments, will have been destroyed. The preservation of the independence of the bar is vital to the due administration of justice and its members should not be subjected to summary contempt judgments, for errors in judgment, when they act in good faith and in the honest belief that their actions are well founded and taken in the interests of their clients. Obviously, an attorney who would refrain from defending the rights of his client because of fear or threats from a trial judge, would be considered quite unworthy of his high commission as a member of the bar and recreant of its honorable tradition of resisting every exercise of tyranny or arbitrary power. *In Re Cottingham, et al.* (Colo.), 182 P. 2, 66 Colo. 335.

WHEREFORE, your petitioner respectfully prays in this petition that this Honorable Court grant a Writ of Certiorari and bring before this Court the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit.

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